

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS FOGARTY, JR.,

Plaintiff,

ATTORNEY DECLARATION

-against-

Civil Case No.: 15-cv-01454
(GLS/DJS)

CITY OF TROY and City of Troy Police
Officers KYLE JONES and ROBERT SMITH,
both Individually and/or as agents, servants,
and/or employees of the City of Troy,

Defendants.

CRYSTAL R. PECK, ESQ., states as follows:

1. I am an attorney duly licensed to practice in the courts of the State of New York and the Northern District of New York and I am a partner with the law firm of Bailey, Johnson, DeLeonardis & Peck, P.C., attorney for Defendants, Officers Kyle Jones and Robert Smith. As such, I am fully familiar with the facts and circumstances of this case.

2. I submit this Declaration together with Exhibits, the Affidavit of Officer Robert Smith, Rule 7.1 Statement of Material Facts, and accompanying Memorandum of Law in support of Defendant, Officer Robert Smith's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. Plaintiff Francis Fogarty, Jr., (hereinafter "Plaintiff"), brought the instant action against, the City of Troy and Officers Kyle Jones and Robert Smith in relation to his arrest which occurred on December 12, 2013. (Dkt. No. 1).

4. Plaintiff alleges that on that date, Officer Kyle Jones used excessive force against him in affecting an arrest. He further claims that Defendant, Officer Robert Smith,

was present and witnessed the force used against him and is, therefore, liable for failing to intercede and prevent harm to Plaintiff. Plaintiff brings a cause of action against all defendants for violation of his constitutional rights under 42 USC §1983.

5. While there is a dispute as to whether Plaintiff was actually subjected to excessive force, based on the facts as alleged by Plaintiff, Defendant Smith, brings the instant motion seeking dismissal of Plaintiff's claims against him on the basis that he did not have a realistic opportunity to intercede and prevent Plaintiff's alleged constitutional violation.

6. The following exhibits are attached hereto and made a part hereof of Defendant's Motion:

- Exhibit "A", EBT Transcript of Francis Fogarty conducted on June 27, 2016;
- Exhibit "B", pertinent portions of the EBT Transcript of Officer Kyle Jones conducted on January 23, 2017; and
- Exhibit "C", EBT Transcript of Officer Robert Smith conducted on January 23, 2017.
- Exhibit "D", CD containing radio transmission for December 13, 2012 in relation to this incident at about timestamp 1:50.

7. Based on the foregoing, the accompanying Memorandum of Law, Rule 7.1 Statement of Material Facts and Affidavit of Robert Smith, it is respectfully submitted that Plaintiff's Complaint be dismissed with prejudice pursuant to Federal Rules of Civil Procedure Rule 56(c) together with any additional relief the Court deems just and proper.

Dated: March 2, 2017

s/
Crystal R. Peck
Bar Roll No. 514375